

No. 17074

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK BREHHA, JR., *et al.*,

Appellants,

vs.

ALFRED J. SVARDA,

Appellee.

APPELLANTS' REPLY BRIEF.

JOHN J. KARMELICH,

AUGUST FELANDO,

HERBERT R. LANDE,

413 West Seventh Street,
San Pedro, California,

Attorneys for Appellants.

FILED

APR 11 1961

FRANK M. SCHMID, CLERK

TABLE OF AUTHORITIES CITED

CASES	PAGE
De Zon v. American President Lines, 318 U. S. 660, 63 S. Ct. 814	10
Miller v. Farrell Lines, 247 F. 2d 503.....	10
Repsholdt v. United States, 205 F. 2d 852.....	10
Roberts v. United Fisheries, 141 F. 2d 288, cert. den. 323 U. S. 753	10

No. 17074

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK BRENHA, JR., *et al.*,

Appellants,

vs.

ALFRED J. SVARDA,

Appellee.

APPELLANTS' REPLY BRIEF.

I.

Appellee's reply brief attempts to demonstrate that the dropping of the fish rack prevented plaintiff from taking the fishing pole out of the leather pad attached to his waist and that somehow this caused a tension on the fish line, which in turn caused the hook to come out and strike plaintiff.

The testimony of the plaintiff is squarely to the contrary and does not support the appellee's argument. The appellee refers to testimony of Mr. Varley an expert witness, but plaintiff did not work in the manner described by the expert.

The plaintiff testified that each fisherman had his own way of working [T. R. p. 219], and the plaintiff's style was as follows:

1. Land the fish on deck.

2. Pull forward on the pole to bring the fish to him [T. R. pp. 193, 194, 208, 210, 218, 219 and 234].

3. When the fish has come to him, *then take the pole out of the pad* [R. T. pp. 208, 217] reach over the stern rail of the boat and unhook the fish [R. T. p. 208].

The fish hook came out of the fish's mouth as plaintiff went forward with his pole to pull the fish to him [T. R. p. 208]. Plaintiff never made step 3—the accident to his eye intervened. That is why the pole was still in the pad when the accident happened.

The tension on the fish line was caused by the pull forward, with fish pole in the pad, that plaintiff voluntarily and intentionally made as part of his usual and normal fishing style. The fish hook came out as plaintiff pulled the fish to him [T. R. pp. 208, 210].

One end of the rack had dropped three to four inches, and then held, at a time when the fish was being brought aboard; after which the plaintiff landed his fish on the deck; then he leaned forward, with the pole still in the pad, to slide the fish to him, preparatory to manually unhooking the fish. He did not intend to take the pole out of the pad until the fish had come alongside to where he was standing [T. R. p. 208] but, as he leaned forward and pulled on the fish, the hook flew out and hit him. Thus, the dropping of the rack played no part whatsoever in the happening of the accident and appellants should not be held responsible therefor.

II.

After he had landed his fish on the deck behind him, plaintiff pulled forward to bring the fish to where he

was standing. [This was after the rack had dropped. because the rack dropped when the fish was still in the air, *before* the fish was landed—T. R. p. 209.]

Svarda—[T. R. p. 193]:

“A. The rack give down underneath me, and at the same time I’m worrying about that fish and I got it in, *naturally I’m going to pull it toward you* or jerk it toward you, one or the other, so you can—

Q. *With a forward motion.* A. *Yes, sir*—so you can turn around and unhook. Well, at the time it all happened so fast I didn’t even know—the hook flew from its mouth and the next thing I know its in my eye.

Q. When you say the hook flew from its mouth, when was that event with reference to the time that the staging gave way? A. It all happened together, sir.

Q. Did the staging give way first? A. Well, sir, it had to give way first, because I’m going back with it and I’m worried about the fish, *and just as I pulled forward naturally* I’m going to unhook the fish, and then boom. it all just happened so fast.”

Svarda—[T. R. p. 194]:

“A. Because once you’ve got your fish in you turn around anyway *after you go and pull it toward you* and unhook it.”

Svarda—[T. R. p. 208]:

“The Court: Now show me in slow motion just how you landed this fish. Now go slow.

The Witness: Well, naturally you've got it up in the air, and you put all your pressure—because it's a heavy fish you pour all your weight back. As I brought it in *I was going to pull it toward me, which I started*, and then all of a sudden the hook flew right directly into the eye, sir. It all happened—

The Court: *Now, where in that sequence did you feel the rack give way?*

Mr. Belli: Where was the fish when you felt the rack give way?

Svarda: *The fish could have been in the air.*
. . .”

Svarda—[T. R. p. 210]:

“Q. I'm talking about the moment of the accident. Immediately prior to the accident didn't you jerk that pole to take the hook out of the fish's mouth? A. No.—I couldn't—I *pulled the fish towards me, that I know.*”

Svarda—[T. R. p. 218]:

“The Court: And this pull, after your fish has hit the deck, this pull you talk about to bring the fish toward you is a pull enough to make the fish slide over the other fish on deck up toward the rail?

The Witness (Svarda): Yes, sir, toward you.

The Court: And it's not a jerk, with the idea of jerking the hook out of its mouth?

The Witness: Well, sir, I said jerk, but what you normally would do is *naturally there is a certain little amount of jerk because you're going to pull, and then you pull it toward you.*”

[T. R. p. 219]:

“Svarda: —after I land a fish I’ll naturally give a little pull, and while I’m doing that I’m turning around and I’ve got my line and I’ve got my fish skidding.” (Italics added.)

III.

It was Svarda’s style to keep the fish pole in the pad during the time that he was pulling the fish over to him.

Mr. Belli—[T. R. p. 219]:

“Q. Normally when that fish is back over you *and on the deck, when you start to bring it forward to you, is your pole then in the socket or out?*

A. No, sir, after you usually make that first pole (pull?), it’s—I don’t know, sir—*each man has his own style.*

Q. How do you do it? Do you have— A. Well, sir, the way I do, sir, after I land a fish I’ll naturally give a little pull, and while I’m doing that I’m turning around and I’ve got my line and I’ve got my fish skidding.

Q. Well, is your pole in the socket, then, when you’ve—”

[T. R. p. 220]:

“A. No, sir, you’ve taken it out then.

Q. I see. Normally you would take it out after the fish is back there. A. Yes, sir. Yes sir.

Q. But on this it was still in the socket? A. Yes, sir, it was turned at an angle.

Q. Why was it still in the socket? A. Because I had just landed the fish—

Q. Yes. A. And it [I] *was going to go through that motion, [to pull it toward you or jerk it toward you] and that's when the hook flew.*"

Svarda again testified [T. R. p. 208] that the pole was to remain in the pad during the time he was pulling the fish forward to him:

"Q. Was the end of the pole still in the pad?

A. It was at an angle, sir.

Q. But still in the pad. A. It was still in the pad, *because I was going to pull forward.*

Q. You were going to pull forward? A. Yes, sir. Because you see you've got the fish, you're turned around like this here, see, you're going to pull it toward you, *and then naturally you take the pole out of your pad when you unhook it (the fish).*"

This testimony shows that *plaintiff did not intend to take the pole out of his pad until he was ready to unhook his fish.* He could not unhook his fish until he had brought it alongside. He had to pull it forward to him to get it in a position so that he could handle it, and when he was making this pull, an act disassociated entirely from the previous drop of the rack, the hook came out of the fish's mouth [T. R. p. 208].

" . . . I was going to pull it toward me, *which I started,* and then all of a sudden the hook flew directly into the eye" [T. R. p. 208].

Again, at page 217 of the Transcript of Record, the plaintiff testified that he took his pole out his pad *after* he had went ahead to pull the fish up to him.

" . . . naturally you take your pole out of your pad *after you go ahead.*" [T. R. p. 217].
(Italics added.)

IV.

We submit that the foregoing testimony of the plaintiff disposes of appellee's argument that plaintiff's fishing style normally called for the removal of the pole from the pad as the fish went over his head. Appellee erroneously argues that plaintiff ordinarily would have removed his pole from the socket in the pad *before* he landed the fish on deck. The above testimony quoted by appellants unequivocally shows that plaintiff kept his pole in his pad *after* he landed the fish, *while* he pulled the fish to him, and only would have removed the pole from the pad when the fish had come alongside and he was ready to unhook it. Of course, this time, as he pulled forward, the hook came out and hit him.

V.

There is absolutely no evidence that when the rack dropped, any tension was put on the line. Appellee makes this bare claim in his brief, and does not cite any testimony in the record in support of the statement.

We submit that we have cited many instances in plaintiff's testimony wherein he states that the pull forward on the line that he made, to pull the fish to him, was the cause of the tension that pulled the fish hook out of the fish's mouth, and the proximate cause of the injury.

VI.

The danger from flying fish hooks is one of the ordinary hazards of fishing with a pole and hook. Commencing at Transcript of Record, page 214, plaintiff testified:

"The Court: Then what is the ordinary practice? To pull the fish up to the rail to get it out,—

The Witness: Yes, sir.

The Court: —or do you jerk the line to try to get it out of its mouth?

The Witness: Some guys will jerk them, and then some will pull them up—pull them up to you. But usually when you jerk it, it's sort of a hazard—the hook can fly.

The Court: The hooks can fly.

The Witness: Yes, sir.

The Court: And hooks do fly, when you are fishing with bait and land a fish and if your line is jerked the hook will fly.

The Witness: No, sir, not definitely from jerking—

The Court: All right. *But what about after the fish hits the deck?* Do you then follow the practice, when you are fishing with live bait, to jerk the line to get your hook loose?

The Witness: Well, sir, you jerk the line to you or your pole.

The Court: I don't mean pulling the line up to you. I mean, when you land a fish, then do you give it a jerk to take the hook out?

The Witness: No, sir, you'd usually just give a jerk to pull it up toward you.

The Court: You mean, you would pull the fish up to you."

On page 215, Svarda testifying:

"The Court: Now when you have been fishing with live bait, *have there been fish hooks fly around.*

The Witness: *Yes, sir, there have been hooks already catch men in necks, and other guys squids and that breaking off, sir. Lots of guys have their heads laid open.*

The Court: *From hooks?*

The Witness: *From hooks. . . .*" (Italics added.)

Therefore, the fact that plaintiff was hit by a hook is not evidence of negligence on one's part.

VII.

There is no liability on the appellants for injury to appellee caused by the usual risks of his calling. The danger of being hurt by a flying fish hook was admitted by appellee, especially when there was a pull or jerk of the fish on the pole.

Svarda—[T. R. p. 214]:

"The Court: —or do you jerk the line to try to get it out of its mouth?

The Witness: Some guys will jerk them, and then some will pull them up—pull them up to you. *But usually when you jerk it, it's sort of a hazard—the hook can fly.*

The Court: The hooks can fly."

[T. R. p. 215]:

"The Court: Now when you've been fishing with live bait, have there been fish hooks fly around?

The Witness: Yes, sir, there have been hooks already catch men in necks, and other guys squids and that breaking off, sir. Lots of guys have their heads laid open.

The Court: From hooks?

The Witness: From hooks. . . ."

The plaintiff did pull or jerk his line immediately before the fish hook came out:

Svarda—[T. R. p. 234]:

“A. Because I was off to one side, and the fish come in, *and I know I gave some kind of jerk* because I wanted to get back, you know, to try to get ahead, and I know the hook flew. That’s all I know.

Q. As you jerked that pole, why did you jerk the pole? A. Well, a lot of times you do when you bring in a big fish, *because you can unhook it.*” (Italics added.)

It is therefore submitted that what was involved in this case was the obvious and well known risks in the business of tuna fishing with the use of a hook, line and pole, and there is an absence of negligence in law.

De Zon v. American President Lines, 318 U. S. 660, 671, 63 S. Ct. 814;

Repsholdt v. United States, 205 F. 2d 852;

Roberts v. United Fisheries, 141 F. 2d 288, 293, Cert. den., 323 U. S. 753.

The fall of the rack preceded the accident in time, but was not a cause of it in any manner. Whatever negligence or unseaworthiness may have been present there, the same had no causal relation to plaintiff’s acts of landing the fish on deck, then, pulling forward to bring the fish to him, and the hook coming out of the fish when the line was pulled. The lack of proximate cause prevents plaintiff from taking advantage of the fact that one of the rack chains gave way before he was hurt.

Miller v. Farrell Lines, 247 F. 2d 503.

VIII.
Conclusion.

It is respectfully submitted that the judgment in favor of plaintiff should be reversed and judgment ordered to be entered in favor of the defendants.

Respectfully submitted,

JOHN J. KARMELICH,
AUGUST FELANDO,
HERBERT R. LANDE,

Attorneys for Appellants.